Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
	)	
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

REPLY COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019

Its Attorneys

December 21, 1992

TABLE OF CONTENTS

SUMMARY

Although Time Warner Entertainment Company, L.P. ("TWE") takes the position that being compelled to carry leased access and public, educational and governmental ("PEG") programming is a violation of TWE's rights as a First Amendment speaker, it offers the following reply comments because it and its divisions will be affected by any rules issued by the Commission.

In reply to the comments previously submitted to the Commission, TWE emphasizes that the Commission should promulgate rules that:

- adopt a definition of "indecent" and "sexually explicit" that incorporates a standard for the cable medium that is based on the average cable viewer on a nationwide basis;
- provide cable operators with adequate time to make the technical adjustments necessary to block channels designated for indecent material on leased access;
- permit cable operators to pass on the expense of the blocked channel to program providers that cablecast on the blocked channel or to subscribers;
- permit cable operators to require program providers to give notice of indecent material through certification within a reasonable amount of time prior to the requested carriage and to deny access to any program provider that refuses to provide such certification or provides a false certification;
- permit cable operators to require program providers to provide evidence of adequate insurance;
- make clear that the Commission's rules preempt all inconsistent local and state laws; and
- require claims under these rules to be brought within 60 days of the alleged violation.

TWE believes these recommendations and those set forth in its original Comments fully comport with congressional policy and would best serve the public interest.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 Indecent Programming and Other Types of Materials on Cable Access Channels	MM Docket No. 92-258

REPLY COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("TWE") respectfully submits the following memorandum in reply to the comments submitted December 7, 1992 regarding the Notice of Proposed Rule Making ("NPRM") relating to the implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

A. The Definition of "Indecent" and "Sexually Explicit". 1/

There is strong agreement among many of those commenting that "indecent" should be defined to incorporate a standard for the cable medium that is based on the average cable viewer on a nationwide basis. See, e.g., Comments of Intermedia Partners ("Intermedia") at 13; Comments of the New York State Commission on Cable Television ("New York") at 5-6; Comments of the National Cable Television Association, Inc. ("NCTA") at 7. This strongly supports TWE's recommended definition of "indecent" set forth in paragraph (a) of the Appendix. 2/

This definition should also apply to the term "sexually explicit" as used in reference to PEG channels. One commenter proposes that "sexually explicit" should be

---

1/ As TWE noted in its original Comments, nothing herein concedes that it is constitutionally permissible for the government to prohibit or restrict the carriage of indecent programming on cable television. Moreover, in Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494, TWE explicitly challenges § 10(d) of th 1992 Cable Act as unconstitutional and requests it be struck down. TWE also challenges in that action the constitutionality of the PEG and leased access provisions of the 1984 Cable Act, which if sustained will remove from the Commission any power to implement the proposed rules. TWE incorporates those arguments by reference herein.

2/ TWE annexes hereto a revised Appendix of suggested amendments and additions to the proposed rules, which supersedes the Appendix annexed to TWE's original Comments.

defined as "obscene", Comments of the Boston Community Access and Programming Foundation ("BCA") at 7, and one commenter proposes that "sexually explicit" should be defined in a much broader way to recognize that "sexually explicit" is not always "patently offensive as measured by contemporary community standards", Comments of Acton Corp., et al. ("Acton") at 11. However, as the Commission has recognized (NPRM at 6 n.11), the congressional intent is that "sexually explicit" as used in Section 10(c) should be interpreted to mean "indecent" as used with respect to the leased access restrictions. It is this intent that must govern. Accordingly, the definition of "indecent" as set forth in paragraph (a) of the Appendix must also be applicable to "sexually explicit" material on the PEG channels. Accord, Comments of Cox Cable Communications ("Cox") at 14 n.11.

B. Blocking of Indecent Programming on Leased Access.

As TWE noted in its original Comments, to block a channel designated for indecent programming will require technical adjustments that will vary from system to system depending on a system's technological development. Other commenters also recognized this and proposed a variety of time periods to accommodate for the time needed to make the

technical adjustments. See, e.g., Intermedia at 19 (180 days); Comments of Continental Cablevision, Inc. ("Continental") at 15 (120 days); Cox at 9 (180 days). Because different systems are at different stages of technological development, one commenter's proposed period may reflect the time needed by that particular commenter, but not that needed by other commenters. Accordingly, it is most practical for the Commission to allow cable operators to have 180 days--the most frequently proposed length of time--to allow cable operators to make the necessary technical and administrative adjustments. 3/ Accordingly, TWE urges the Commission to adopt paragraphs (b)(1) and (b)(2) as proposed by TWE.

In addition to the time required to block a channel designated for indecent programming, there will also be expenses related to the blocked channel. Many commenters propose that cable operators be permitted to pass expenses onto the program providers that cablecast on the blocked

---

3/ The 180 days should be applicable only to systems that are already addressable. Because many systems are not yet addressable and therefore not as technologically developed and flexible, the rule should allow cable systems that are not addressable to become addressable before requiring them to block channels. See Appendix ¶ (b)(2).

channel or to subscribers. 4/ See Intermedia at 20, Acton at 10, NCTA at 13-14; Comments of the Community Antenna Television Association, Inc. ("Community Antenna") at 7-8; Continental at 10-11. TWE agrees with these commenters. Leased access programmers, which are involved in commercial ventures, should be required to bear the costs of selecting to present indecent programming. Cable operators are already compelled to carry programs that they would not otherwise choose to carry, set aside special channels to carry programs that contain indecent material, and block such channels when necessary. Cable operators should not additionally be required to bear the expenses of the blocked channels simply because programmers decide to present indecent programming. 5/

4/ With regard to passing the expense of blocked channels onto the subscriber, TWE submits that cable operators should be able to limit the frequency of requests to unblock and block channels or be able to charge subscribers requesting access to a blocked channel a reasonable amount for the equipment and other costs necessary to provide access. See Cox at 11. Without this ability on the part of the operator, subscribers will have no incentive to use their individual locking devices and instead may simply request cable operators to block and unblock a channel depending on the subscribers' current desires.

5/ With regard to the comments that suggest that because public access corporations have "limited resources", "actions taken by an operator under Section 10 must be undertaken at the operator's own expense", those comments are not applicable here because they address only PEG access. See, e.g., Columbus Community Cable Access, Inc.

C. Program Provider Certification.

There is a consensus among the commenters that cable operators should receive prior notice that a leased access programmer intends to present indecent material. 6/ The commenters, however, propose different lengths of time by which program providers must provide notice. See, Intermedia at 16 (14 days); Continental at 15 (45 days); NCTA at 10-11 (60 days for initial notification and 30 days thereafter); Acton at 7 (7 days); Comments of Hillsborough County Board of County Commissioners ("Hillsborough") at 5 (7 days for pre-produced programs and 3 days for live

---

("Columbus Community") at 1-2; Comments of David B. Dreety at 2; Comments of Capital Community Television, Salem, Oregon ("Capital Community") at 2; Comments of Ann Arbor Community Access Television ("Ann Arbor") at 2.

6/ This should apply to programmers that present live, satellite feed or other instantaneously delivered programming, as well as those that present pre-taped programming. These other program providers may be required to certify that they plan to include indecent material or that they will not include any indecent material. The Comments of the National Association of Telecommunications Officers and Advisors, et al., urge (at 5-6) that live programming providers should be required to certify only that they have "exercised reasonable efforts to ensure that their programs will not contain obscene or otherwise proscribed material". While TWE recognizes the uncertainties of live programming, it does not agree that live program providers should be allowed to provide a less encompassing certification. It is live program providers that choose the "live" format--a format that allows unplanned indecent material to be cablecast--therefore it should be the program providers that bear the responsibility for the content of, and liability for, that programming.

programs); Joint Comments of Blade Communications, Inc. et al. ("Blade") at 10 (45 days); Community Antenna at 8 (60 days); Cox at 7 (30 days). These different proposals demonstrate that different parties have different ideas regarding what is adequate notice. 7/ Accordingly, these proposals support TWE's recommendation that each cable operator be permitted to require that notice be given a reasonable amount of time prior to the requested carriage, depending on the cable operator's individual circumstances. TWE at 17-18; see also New York at 7-8 (proposing "a more general and flexible notice period that is 'reasonable, under the circumstances'"). Accordingly, the Commission should adopt TWE's proposed paragraph (c).

With regard to a programmer refusing to provide certification or providing a false certification regarding the nature of its programming, commenters emphasized that such refusal should allow the cable operator to deny access to that programmer, without creating a claim against the operator by the programmer. Comments of the City of San Antonio, Texas at 3; Acton at 7; Hillsborough at 5; Blade

---

7/ There can be little doubt that TWE, in particular its New York City systems, has the widest experience with sexually explicit programming provided on leased access. See Comments of Time Warner Entertainment Company, L.P. ("TWE") at 2-4.

at 13; Intermedia at 14. TWE supports these commenters. Accordingly, it requests the Commission to adopt its proposed paragraph (c) as supplemented with the following language: "Cable operators may deny access to any program provider that refuses to provide a certification or provides a certification that is false."

If a programmer provides certification, New York proposes (at 8) that certifications be retained for two years because that is the retention period under New York law for certain documents relating to PEG channels. As was noted in TWE's original Comments, 18 months is more consistent with federal retention periods. 8/ See TWE at 18 n.13; compare, Cox at 7 ("Cable operators should not be required to keep file copies of programmer certifications for more than three or four months."). In addition, to reduce the burden on cable operators of maintaining various records, Cox proposes (at 7) that the Commission require parties complaining about access programming to present their claims within 60 days. TWE supports this proposal and respectfully suggests that the Commission should adopt its proposed new paragraph (m): "Any claim brought under this

---

8/ And in any event, systems operating in New York will abide by the New York retention periods for PEG channels.

subpart must be commenced within 60 days of the action complained of." 9/

D. Liability and Indemnification.

Denver Area Educational Telecommunications Consortium, Inc. proposes (at 11) that the Commission make clear that a cable operator is not shielded from contractual liability if the operator bars programming that is not obscene or indecent. This proposal is counter to the congressional intent to protect children from viewing indecent and obscene programming and imposes an unfair burden on cable operators. If cable operators face contractual liability for making a close and difficult decision that a court nevertheless later disagrees with, cable operators will tend to err on the side of cablecasting what might be indecent material. To ensure that children are protected and to avoid unfairly burdening cable operators, the Commission should not adopt Denver's requested statement. Additionally, TWE proposes that the Commission adopt its proposed paragraph (d), as supplemented with the following language: "The limitation of programming to a blocked channel or the decision not to cablecast

---

9/ Claims brought under any rules promulgated by the Commission regarding leased access prices, terms and conditions should have a similar time limitation. See 1992 Cable Act § 9(b)(2).

programming based on a cable operator's good faith belief that the programming is indecent or obscene shall not subject the cable operator to any form of contractual liability to the program provider whose programming is limited or not cablecast."

Intermedia proposes (at 4-5) that cable operators be permitted to require program providers to demonstrate that they are adequately insured to protect cable operators against liability resulting from cablecasting their programming. TWE supports this proposal. Even if program providers agree to indemnify cable operators, adequate insurance is necessary because many program providers may not, in reality, be able to indemnify cable operators. 10/ To ensure that program providers' indemnifications have substance to them, TWE respectfully requests that the Commission adopt its proposed paragraphs (c) and (f) as revised in the following manner: "(c) . . . Cable operators may require program providers to indemnify cable operators completely for any liability or expense the cable operators may incur in relation to the programming submitted for cablecast and may require program providers to provide

---

10/ Indeed, certain commenters specifically make a point of the limited resources of access programmers. See, e.g., Columbus Community at 1; Capital Community at 2; Ann Arbor at 2.

evidence of adequate insurance in support thereof without such requirements constituting 'unreasonable terms' under 47 U.S.C. § 532"; and "(f)(2) [PEG program providers] agree that they will indemnify the cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system for any liability or expense they may incur in relation to the programming, and to provide evidence of adequate insurance in support thereof".

E. Regulation of Public, Educational and Governmental Access.

Hillsborough recommends (at 5) "the limiting of cable operator control over PEG Access programming to public access only, except in those instances where the cable operator is specifically required to program the governmental and educational access channels as well". Hillsborough provides no reason for this recommendation. Whatever its reasoning, however, this recommendation is counter to the clear language of the statute. It makes no difference whether such programming is on a public, educational or governmental access channel, cable operators are permitted to prohibit obscene and indecent programming, as well as programming that solicits or promotes unlawful

conduct. Accordingly, Hillsborough's recommendation should be rejected.

Two individuals, Virginia B. Bogue and Amy Lerom, request the Commission to set very specific rules regarding the placement of PEG channels that contain indecent programming, the hours during which such programming may be cablecast and monthly billing statements notifying subscribers of the presence of "adult" programming. This type of micromanagement of the PEG channels is not what Congress intended. As was noted in TWE's original comments (at 23) Senator Wirth stated that through Section 10(c) Congress was "giv[ing] a very clear signal to the cable companies that, in fact, they can police their own systems". 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992). Congress therefore intended cable operators to have discretion regarding certain material cablecast on PEG channels. That discretion, which is so newly returned to the operator by Congress, should not be taken away. 11/

11/ Furthermore, requiring the placement of any public access channel that contains indecent programming on channel 50 or above, as Ms. Bogue and Ms. Lerom propose, would be an unconstitutional restraint on TWE's editorial freedom.

F. Preemption by the Commission's Rules.

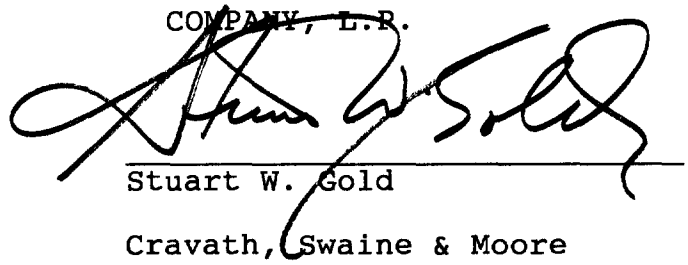
Continental and Intermedia request the Commission to state that its rules preempt all inconsistent local and state laws. Continental at 6-7; Intermedia at 10-12. This is in no way a controversial request given the breadth of authority and scope of regulation delegated to the FCC in the cable area by the 1992 Cable Act. See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699-700 (1984). TWE joins in this request that the Commission make clear that its rules preemptively apply and respectfully requests the Commission to adopt TWE's proposed rules, supplemented with the following additional paragraph: "(1) Any provision of law of any state, political subdivision, or agency thereof, or franchising authority or any provision of any franchise granted by such authority, which is inconsistent with this subpart shall be deemed to be preempted and superseded."

Conclusion

With the understanding that TWE has taken a position against its cable systems being forced to carry leased access and PEG programming, TWE has appended hereto revised recommended rules to implement Section 10 of the 1992 Cable Act and respectfully submits them for the Commission's adoption.

Respectfully submitted,

TIME WARNER ENTERTAINMENT COMPANY, L.P.



Stuart W. Gold

Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000
Its Attorneys.

December 21, 1992

APPENDIX

REVISED PROPOSED RULES REGARDING INDECENT PROGRAMMING AND OTHER TYPES OF MATERIALS ON CABLE ACCESS CHANNELS

REVISED* PROPOSED RULES REGARDING INDECENT PROGRAMMING AND OTHER TYPES OF MATERIALS ON CABLE ACCESS CHANNELS

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation of Party 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611, 612, ___ Stat. ___, 47 U.S.C §§ 531, 532.

2. Subpart ___ is amended by adding the following new section:

§76. ___ Restrictions on Indecent programming on Leased Access Channels; Restriction on Obscene Materials and Other Types of Materials on Public, Educational, and Governmental Access.

(a) A cable operator may enforce prospectively a written and published policy of prohibiting on leased access channels programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs, in a patently offensive manner, as measured by contemporary community standards for the cable medium, and when judged in the context of the entire program, including the program's overall merit.

(b) All programs intended for carriage on channels designated for commercial leased access use under this section and identified by the program provider as indecent shall be placed on one or more channels designated by the cable operator for indecent programming, except for such programs prohibited by the cable operator pursuant to paragraph (a) above. A cable operator shall block any such channel at least during the times when indecent programming is being carried except for subscribers requesting access to such channel in writing. The cable operator may group time slots to be made available for indecent programming in order to facilitate the administration and the sale of time on

---

* These Revised Proposed Rules supersede the Proposed Rules annexed to TWE's original Comments. Revisions to TWE's original proposed rules are enclosed within brackets.

these channels without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2).

(1) For cable systems that are fully addressable, this paragraph (b) is effective 180 days after publication in the Federal Register.

(2) For cable systems that are not fully addressable, this paragraph (b) shall not apply until the earlier of:

(A) the time at which the cable system is fully addressable; or

(B) 10 years after the effective date of this rule.

(3) In those circumstances where the time requested by the program provider is already under contract, the cable operator shall offer the program provider time available on the channel as close as possible to the time requested. If no other time is available, the cable operator is entitled to refuse to carry the programming on its system until capacity is available for indecent programming, upon further application by the program provider, [without such action constituting a denial of access subject to action under 47 U.S.C. § 532 (d) or (e)(1)].

(4) In those circumstances where two or more program providers request the same time period on a channel designated for indecent programming, the cable operator can select which program provider will program that time period without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2).

(c) [It shall not be unreasonable for] cable operators to require program providers on leased access channels that lease or otherwise contract for time to certify to cable operators, a reasonable time prior to cablecast determined by the cable operators, that they [will not include obscene material in their programming and that they] plan to include indecent material as defined in paragraph (a) above in their programming or that they will not include any indecent material as defined in paragraph (a) above in their programming for the duration of the lease or contract period. Such certification can be required to be in the contract for time or in some other available manner, at the

cable operators' discretion. [Cable operators may deny access to any program provider that refuses to provide a certification or provides a certification that is false.] Cable operators [may] require program providers to indemnify cable operators completely for any liability or expense the cable operators may incur in relation to the programming submitted for cablecast [and may require program providers to provide evidence of adequate insurance in support thereof without such requirements constituting "unreasonable terms" under 47 U.S.C. § 532].

(d) The failure to limit indecent programming to a blocked channel as required by this rule shall not subject the cable operator to sanction by the Commission unless it is demonstrated that the operator had received the required written notice from the program provider in a timely fashion. [The limitation of programming to a blocked channel or the decision not to cablecast programming based on a cable operator's good faith belief that the programming is indecent or obscene shall not subject the cable operator to any form of contractual liability to the program provider whose programming was limited or not cablecast.]

(e) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system may prohibit the use of any channel capacity on such facilities for any programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct.

(f) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system [may] require that public, educational or governmental program providers (including government or access organizations acting as program providers) (1) certify, by contract or otherwise, that they will not submit programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct, and (2) agree that they will indemnify the cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system for any liability or expense they may incur in relation to the programming [, and to provide evidence of adequate insurance in support thereof].

(g) In any dispute brought under paragraphs (e) or (f), there shall be a presumption that the findings of the cable operator regarding programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct are reasonable and in good faith unless shown by clear and convincing evidence to the contrary. A cable operator, or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system, [may refuse to cablecast any program it] determines to contain obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct until the program provider challenges that determination and there is a final decision by a competent authority that the programming does not fall within one of the prohibited categories set out in paragraph (e).

(h) Cable operators [may] require local governments or access organizations to indemnify them completely for any liability or expense the cable operators incur as a result of indecent programming being carried on their systems which the local governments or access organizations control.

(i) A cable operator is authorized to require a franchising authority to provide its assurance that it will not hold the cable operator liable for breaching an obligation under its franchise to provide public, educational and governmental programming if the cable operator in good faith withholds programming because it finds it to be within one of the prohibited categories set out in paragraph (e).

(j) Cable operators are authorized to require local franchise authorities to indemnify them completely for any liability or expense the cable operators incur as a result of the franchise authorities prohibiting the cable operators from cablecasting programming pursuant to 47 U.S.C. § 532(h).

(k) Cable operators shall not incur any liability under state or local law for any program that involves obscene material which is carried on any channel designated for public, educational, or governmental use or on any other channel obtained under 47 U.S.C § 532 or under similar arrangements.

[(l) Any provision of law of any state, political subdivision, or agency thereof, or franchising authority or

any provision of any franchise granted by such authority, which is inconsistent with this subpart shall be deemed to be preempted and superseded.]

[(m) Any claim brought under this subpart must be commenced within 60 days of the action complained of.]